BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the Court of Appeals is reported in 283 N. Y. 68, and is appended to the record. No opinion was rendered by either the Appellate Division or Special Term of the Supreme Court. The report and opinion of the referee appear in the record (fols. 142-162) and are not otherwise reported.

II.

Jurisdiction.

1. The date of the order and judgment of the Court of Appeals is May 28, 1940. By order dated August 12, 1940, Hon. Stanley Reed, Associate Justice of the Supreme Court of the United States, extended to October 24, 1940, the time within which petitioner might apply to this Court for a Writ of Certiorari.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

3. The Court of Appeals has stated in its amended remittitur the questions under the United States Constitution presented and necessarily passed upon by that tribunal in arriving at its decision.

III.

Statement of the Case.

This has already been stated in the preceding petition under 1 (pp. 2 to 5).

IV.

Specifications of Error.

The Court of Appeals erred in holding:

1. That the order of dissolution by the New York Supreme Court terminated the corporate existence of National Surety Company in all respects and that a judgment thereafter obtained in another State is null and void.

2. That the judgment of the Chancery Court of Mississippi is void in New York and not entitled to be accorded, by the Courts of the State of New York full faith and credit under Article IV, Section 1, of the Constitution of the United States.

3. That the proceedings in the State of Mississippi did not furnish an adequate basis for an *in personam* judgment.

4. That the proceedings taken under Article XI of the New York Insurance Law revoked the designation of the Commissioner of Insurance of Mississippi as statutory agent of National Surety Company and limited the time within which said Company might, under Mississippi statutes, be sued in that State, but that such proceedings nevertheless did not impair

petitioner's contractual rights or violate the provisions of Article 1, Section 10 of the United States Constitution.

5. That the irrevocable designation by National Surety Company of the Commisisoner of Insurance of Mississippi as statutory agent for the service of process is analogous to a "power of attorney which ceases with the death of the individual" who granted it.

V.

Argument.

Summary of the Argument.

Point I. The judgment of the Chancery Court of Mississippi rendered by a court possessing jurisdiction both of the parties and the subject matter, is a judgment *in personam*, is valid in all respects and is entitled to full faith and credit in the State of New York, pursuant to Article 4, Section 1 of the Constitution of the United States. Furthermore, it is competent evidence in this proceeding and is determinative of the rights and liabilities of the parties.

Point II. The irrevocable designation by National Surety Company of the Mississippi Commissioner of Insurance as statutory agent for the service of process, and the Surety Company's acquiescence in the provisions of Section 4171 of the Mississippi Code which continued corporate existence for a period of three years after dissolution for the purpose of suit, constituted "true contracts" and to the extent that Article XI of the New York Insurance Law

operated to revoke the designation and limit the time for suit in Mississippi, on contracts made and required to be performed in that State, the latter statute impairs the obligations of contract and violates Article 1, Section 10 of the United States Constitution.

POINT I.

The judgment of the Chancery Court of Mississippi is valid in all respects and is entitled to full faith and credit under Article IV, Section I, of the Constitution of the United States.

A.

The decree of dissolution did not terminate the corporate existence of National Surety Company for all purposes: It might still sue and be sued because its existence was continued by statute.

The Court of Appeals held that the order of the New York Supreme Court, dissolving National Surety Company and annuling its charter, terminated the existence of the corporation and that a judgment thereafter obtained was a nullity and void in New York. That such result follows dissolution at common law, we do not dispute.

However, there was in force in the State of Mississippi, at all times material herein, a statute continuing the existence of foreign corporations admitted to do business in that State, and thereafter dissolved, for a period of three years after dissolution for the purpose of suing and being sued. Section 4171 Miss. Code (fols. 38 and 39).

The Supreme Court of Mississippi has ruled expressly that this statute applies to New York Insurance Corporations admitted to do business in Mississippi and later dissolved in New York.

> *Rawlings* v. *American Oil Co.*, 173 Miss. 683;
> *Universal Life Insurance Co.* v. *Catchings*, 169 Miss. 26.

Furthermore, National Surety Company, as a condition of its admission, irrevocably designated the Commissioner of Insurance as its agent for the service of process, as required by Section 5165 of the Mississippi Code (fols. 61 and 62, 149). The Supreme Court of Mississippi, in construing this statute, which is in *pari materia* with Section 4171, stated:

> "The purpose of the statute was to domesticate foreign insurance companies in this state, so far as suits against them were concerned, in that respect that they should stand exactly as if they were domestic insurance companies. The word 'liability' in the statute is not confined to contracts alone, but to any liability cognizable in the Courts. As long as there is any outstanding liability, the insurance commissioner's authority cannot be revoked, and until revoked he is the agent of the company for the service of process."
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> *Universal Life Insurance Co.* v. *Catchings*, *supra*.

Where such statutes exist, the common law rule does not apply; corporate existence, for the purpose of suit, survives dissolution and a judgment thereafter obtained is valid and binding upon the parties.

> *Clark* v. *Williard*, 292 U. S. 112;
> *Washington ex rel. Bond and Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361.

Although the cases last referred to are directly in point and were stressed on the appeal, the Court of Appeals neither discussed nor cited them in its opinion.

On the other hand, the cases cited in the opinion of the Court of Appeals in support of the conclusion that a judgment obtained after dissolution is a nullity, did not, in a single instance, involve statutes continuing corporate existence after dissolution. The Supreme Court of the United States in *Clark* v. *Williard*, 292 U. S. 112, recognized this distinction, took pains to point it out, and held that said cases are not controlling where the continuance of corporate existence is provided for by statute.

B.

Service on the Commissioner of Insurance imparted full jurisdiction *in personam* to the Chancery Court.

The designation of the Mississippi Insurance Commissioner by National Surety Company was irrevocable, and continued in force so long as any liabilities of the company remained outstanding in Mississippi. Section 5165, *Mississippi Code; Universal Life Insurance Co.* v. *Catchings*, 169 Miss. 26.

Section 5165 provides that service on the Commissioner "shall be of the same force and validity as if served on the Company". The Chancery Court possessed jurisdiction *in personam*.

Penn. Fire Insurance Co. v. *Gold Issue Mining Co.*, 243 U. S. 93;

Neirbo Co. v. *Bethlehem Shipbuilding Co.*, 308 U. S. 165, 175;

Pennoyer v. *Neff*, 95 U. S. 714;

Bagdon v. *Phil. & Reading C. & I. Co.*, 217 N. Y. 432, 436-7.

The judgment of the Chancery Court, being *in personam*, its efficacy is not confined to Mississippi. It is an adjudication on the merits and is conclusive as to the matters therein decided. *Sistare* v. *Sistare*, 218 U. S. 1. As such, it constitutes competent evidence in this proceeding. *Matter of Casualty Co. of America*, 206 App. Div. (N. Y.) 314. And, as a valid judgment of a court of competent jurisdiction of a sister state, it is entitled to be accorded full faith and credit by the Courts of the State of New York pursuant to Article IV, Section 1 of the United States Constitution.

Titus v. *Wallick*, 306 U. S. 282;
Clark v. *Williard*, 292 U. S. 112.

POINT II.

Article XI of the New York Insurance Law (Cons. Laws, Ch. 28, Sec. 407), to the extent that it operates to revoke the designation of the Mississippi Commissioner and to limit the time for suit in Mississippi, impairs the obligations of contracts and violates Article I, Section 10 of the Constitution of the United States.

The Court of Appeals held that the proceedings taken in New York terminated for all purposes the corporate existence of National Surety Company, cancelled the irrevocable designation of the Mississippi Commissioner, nullified Section 4171 of the Mississippi Code, but nevertheless did not impair the

petitioner's contractual rights and did not violate Article 1, Section 10, of the United States Constitution.

In explanation of this "most unusual paradox" the Court asserted that the designation of the Commissioner of Insurance as statutory agent "was analogous to a power of attorney granted by an individual, which ceases upon the death of that individual". Yet the Supreme Court of the United States held as recently as November, 1939, that "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent", and further, "A statute calling for such a designation is constitutional". *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175.

The bond in suit was executed and delivered in Mississippi, countersigned by the Surety Company's resident agent in that state (fols. 106 to 110). *It is a Mississippi contract. U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32.

The State of Mississippi had the right to require that National Surety Company subject itself to the laws of that State, as a condition of being allowed to engage in business therein.

Clark v. *Williard*, 292 U. S. 112.

The voluntary Act of National Surety Company in making itself amenable to the provisions of Section 5165 and Section 4171 of the Mississippi Code, requiring that a foreign corporation engaged in business in that State designate the Commissioner of

Insurance as agent for the service of process, and providing for continued corporate existence for a period of three years after dissolution, for the purpose of suing and being sued, constituted "true contracts" in and of themselves, became an integral part of the bond in suit and enured to the benefit of the obligees under the bond in suit, Cooper's legal representatives and the distributees of his estate.

Bagdon v. *Phil. & Reading C. & I. Co.*, 217 N. Y. 432, 436, 437;
Woodward v. *Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 489.

The Legislature of the State of New York is without power to enact laws purporting to have extraterritorial effect on contracts made outside that State. *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32, 40, 41. Yet, the Court of Appeals has now construed Article XI of the New York Insurance Law as having the effect of revoking the Mississippi Commissioner's authority, and of cutting down the time within which National Surety Company might, under Section 4171 of the Mississippi Code, be sued in Mississippi on contracts made in that State. As the result of this interpretation Article XI abrogates the contractual rights of the parties, impairs the obligations of contract, and constitutes an invalid exercise of the legislative power and a violation of Article 1, Section 10 of the Constitution of the United States.

Mutual Life Insurance Co. v. *Cohen*, 179 U. S. 262;

U. S. Mortgage & Tr. Co. v. *Ruggles*, 258 N. Y. 32, 40, 41.

This Court has heretofore decided that a valid judgment may be obtained after dissolution against a foreign corporation in a state to which it has been admitted if, as a condition of such admission, it has designated a statutory agent upon whom process may be served.

Clark v. *Williard*, 292 U. S. 112; 294 U. S. 211;
Washington ex rel. Bond and Goodwin and Tucker v. *Superior Court*, 289 U. S. 361.

This Court has also held that service on a statutory agent imparts jurisdiction *in personam*.

Penn. Fire Ins. Co. v. *Gold Issue Mining Co.*, 243 U. S. 93.

There appears to be no decision, however, combining these two features, viz., that a valid judgment *in personam* may be obtained after dissolution against a foreign corporation in a state to which it has been admitted and in which, as a condition of such admission, it has designated a statutory agent. The decision called for in the instant case represents the next logical, and the final, step in the direction indicated by this Court in the cases last mentioned. The determination by this Court of the question here presented will reblaze the trail temporarily obscured by the unsound decision of the New York Court of Appeals.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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